In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1723

STATES STEAMSHIP COMPANY and
PACIFIC FAR EAST LINE, INC.,
Petitioners,

VS.

THE HONORABLE ALFONSO J. ZIRPOLI, SENIOR DISTRICT JUDGE,
(R. J. REYNOLDS TOBACCO COMPANY and
SEA-LAND SERVICE, INC.,
Real Parties in Interest),
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITIONERS' REPLY BRIEF

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THE ISSUES TO BE TRIED

Respondents do not contest[1] the fact that the central issue to be tried by the District Court pursuant to its order of January 9, 1979 is that raised by the Sea-Land

[1]Respondents fail in the space of 20 pages of opposition to attempt an identification of the issues to be tried by the District Court. Thus, there is no mention of the District Court's announcement that it would weigh the credibility of witnesses and conduct an "actual trial" and no citation or discussion of any legal authorities pertinent to these critical procedural facts upon which petitioners rely.

counterclaims, *viz.:* whether petitioners paid rebates or falsely denied the payment of rebates.[2]

In fact, respondents themselves admitted to the District Court that rebating by PFEL as alleged in the Sea-Land counterclaims was in issue and had not been shown:

> "[Counsel for Respondents]: . . . it becomes clear there really are two questions here.
>
> "Number one, did PFEL rebate?
>
> "Number two, did that rebating start before October 15, 1976?"[3]

The Sea-Land counterclaims allege, in substance, that petitioners paid rebates, failed to disclose rebates and issued false denials of rebating[4]. As stated, these allegations were denied by petitioners and a jury trial as to the issues raised thereby was demanded.[5]

The order of January 9, 1979 specifies as issues to be tried the contention by defendants that petitioners made certain "false representations" *viz.:*

> "PFEL's denials, in its reply dated December 22, 1976, of paragraphs 27 and 29 of Sea-Land's Answer and Counterclaim dated November 9, 1976;

[2]E.g., Compare: Answer and Counterclaim of Defendant Sea-Land Service, Inc., ¶¶ 27, 30 [Petition, App. D, pp. 6, 7] with Order Directing Evidentiary Hearing, ¶ 1(a)(ii) [Petition, App. A, p. 2]. For further information, petitioners attach as Appendix 1 a portion of the transcript of the hearing before the District Court on January 2, 1979 containing colloquy between the Court and counsel pertinent to the issues to be tried.

[3]Proceedings before United States Magistrate pursuant to order of Reference, November 1, 1978, TR. p. 103:12-16.

[4]Pet., App. D, ¶¶ 27, 29; App. G, ¶¶ 38, 40; App. J, ¶¶ 23, 25.

[5]Pet., App. F, pp. 2, 6; App. H, pp. 2, 6; App. K, pp. 1, 2 and 5.

> "PFEL's denial, in its reply dated February 3, 1977, of paragraphs 38 and 40 of Sea-Land's Answer to Amended Complaint and Counterclaim dated January 7, 1977;
>
> "States' denial, in its reply served on July 12, 1977, of paragraphs 23 and 25 of Sea-Land's Answer and Counterclaim dated June 22, 1977."[6]

Respondents nowhere contend or suggest to this Court that the fact of rebating as alleged in the Sea-Land counterclaims has been established, nor do they suggest that there is no genuine issue as to any material fact concerning this issue. As noted by respondents, petitioners have, in answer to interrogatories, deposition testimony and in the pleadings:

> "consistently denied the payment of rebates".[7]

It must at this point be stressed that the Sea-Land counterclaims themselves allege both rebating and the "false denial of rebating" by petitioners. Clearly, the matter of "false denial of rebating", raised by the Sea-Land counterclaims and specified in the order of January 9, 1979

[6]Pet., App. A. pp. 2, 3.

[7]Opp. Brief, p. 5. Petitioners attach as Appendix 2 hereto pages 22 and 68 of the transcript of the hearing before the District Court held on December 13, 1978, which constitutes the sole authority for the statement by respondents that:

> "Petitioners' attorney admitted to the District Court that PFEL had paid rebates until the end of 1977 (Dec. 13, 1978 TR. 68). He asserted that PFEL did not pay rebates before October 15, 1976, although he admitted that an agent of PFEL did pay rebates before October 15, 1976 (Dec. 13, 1978 TR. p. 22)." (Opp. Brief, p. 7).

The most temperate observation that can be made concerning respondents' claim is that it is demonstrably, by reference to the very record they cite, false.

presents the same issue. More importantly, it seems an impossibility to try the issue of "false denial" of rebating without trying and determining whether or not rebates were paid as alleged in the counterclaims.

In the context of these proceedings, the logical sequence of issues to be determined would be, as suggested by the allegations of the counterclaims themselves:

> (1) Did petitioners in fact engage in rebating as alleged in the counterclaims, and, if so;
>
> (2) Did petitioners falsely deny the payment of rebates.

Respondents attempt to eviscerate the substance of the District Court's order of January 9, 1979 by telling this Court that petitioners object to the "holding of a hearing".[8] This is not only silly, it ignores the record fact that the District Court has stated that it will not only "hold a hearing" but weigh the credibility of witnesses and make findings of fact as to the issues specified in its January 9, 1979 order, including the issue of rebating. The District Court stated that it would:

> "... pass upon what I consider to be actual facts and properly admissible facts as though this were an actual trial on this very issue."[9]

The order of January 9, 1979 contemplates an actual trial on the issue of rebating with tens of thousands of documents moved into evidence and numerous live witnesses

[8]Opp. Brief, p. 4.
[9]Pet., p. 11.

being called by respondents from all over the United States and from overseas.[10]

Petitioners submit that, no matter how the issue is tortured or manipulated, the District Court must take evidence on and determine the fact of rebating as alleged in the counterclaims before it can begin to determine whether rebating has been falsely denied.

EQUITY JURISDICTION CONFERRED BY F.R.CIV.P. RULE 37(b) DOES NOT EMPOWER A DISTRICT COURT TO TRY CONTESTED ISSUES OF FACT RAISED IN ACTIONS AT LAW CONCERNING WHICH JURY TRIAL HAS BEEN DEMANDED

A. Equity Jurisdiction Under F.R. Civ. P. Rule 37(b)

Respondents have now abandoned any reliance upon Rules 16, 41(b) or 56 of the Federal Rules of Civil Pro-

[10]Defendants have advised the District Court that the trial on the rebating issue is expected to last at least several weeks and perhaps longer. Petitioners have received tens of thousands of documents which respondents intend to move into evidence in support of the rebating issue to be tried. Respondents have recently served trial subpoenas and notified the District Court and petitioners that numerous witnesses, some coming from overseas, will be called by respondents during the course of the mini-trial.

Putting the question of petitioners' right to jury trial to the side, it is difficult to imagine how a proceeding of the nature contemplated conforms with the mandate of Rule 1 of the Federal Rules of Civil Procedure or how it squares with the rightfully expressed concern of this Court as to the crowding of federal dockets and the prejudicial delays incident thereto. This case now has more than 600 entries on the District Court's docket sheet evidencing the strenuous efforts expended by R. J. Reynolds Tobacco Company to extricate itself, through procedural stratagem, from serious antitrust litigation. The 600 entries exist on the docket sheet notwithstanding the fact that petitioners have not as yet, 2½ years after the complaints were filed, been accorded any discovery whatsoever on the major monopoly allegations of their complaints.

cedure in connection with their July 24, 1978 motion to dismiss.[11] This circumstance follows from their forced recognition of the fact that the District Court is not employing the hearing in question in order to formulate issues for trial pursuant to Rule 16 or to make a determination as to the existence of genuine issues of material fact pursuant to Rule 56, and from their implicit admission that Rule 41(b) speaks most directly to the question of actions properly tried by the Court without a jury.

Petitioners agree with the principle that, in the usual circumstances, a party has no right to jury trial on a Rule 37(b) motion for sanctions.

Petitioners' agreement springs from the fact that a motion made under Rule 37(b) is properly based upon an admitted or uncontrovertible non-compliance with valid court order or other wrongdoing, a threshold circumstance not present here,[12] and upon the fact that, in the normal course, a Rule 37(b) hearing is conducted so that the trial court might consider the presence and degree of any willfulness attendant to the non-compliance or wrongdoing.[13] Assuming

[11]As noted, respondents originally filed their motion "for an order pursuant to Rules 16, 37(b), 41(b), and 56", Pet., p. 9. Respondents now state that their motion is one "for sanctions pursuant to Rule 37(b) of the Federal Rules of Civil Procedure", Opp. Brief, p. 4.

[12]Respondents fail to advise this ourt that on June 2, 1978, the District Court denied respondents' "motion for sanctions based on petitioners' failure to produce documents and answer interrogatories as ordered by the District Court". Compare: Opp. Brief, p 8 with ¶ 3 of the Order of June 2, 1978, attached hereto as Appendix. 3.

[13]— *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197 (1958) involved a request made pursuant to Rule 34 of the Federal Rules of Civil Procedure for particular, admittedly relevant, documents shown to

the trial court finds willfulness, it then determines the nature of the sanction to be imposed.

exist. There was an admitted complete failure to produce the documents as required by valid court order. The party failing to produce attempted to excuse compliance, i.e. demonstrate the absence of willfulness, on the ground that the documents were not within its control. The District Court's dismissal of the complaint was affirmed on appeal but reversed by this Court after a discussion of evidence pertinent to the issue of willfulness.

— *G-K Properties v. Redevelopment Agency,* 577 F.2d 645 (9th Cir. 1978) went forward on the basis of an uncontested failure to produce particular, admittedly relevant documents as required by court order coupled with a failure to file an affidavit showing that the documents subject to the court order did not exist. Subsequently, it was admitted by the party resisting discovery that the documents in question did exist and the District Court entered its order of dismissal.

— *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639 (1976) involved an admitted and continuing failure to file answers to interrogatories concerning critical issues as required by court order. When, after completely exhausting the patience of the District Court, answers were filed, they were so grossly inadequate as to support a further finding of willful failure to comply with court order and make dismissal appropriate.

— *Flaks v. Koegel,* 504 F.2d 702 (2d Cir. 1974) stands for the proposition that, when a District Court considers a sanction as severe as dismissal, a hearing on the issue of "willfulness" of an admitted failure to answer interrogatories and to appear for a deposition should be held prior to a decision by the District Court.

— *McMullen v. Travelers Insurance Co.,* 278 F.2d 834 (9th Cir.), *cert. denied,* 364 U.S. 867 (1960) involved the issue of whether a persistent and admitted refusal by a party to comply with a Rule 35(a) order requiring submission to physical examination was a ground sufficient to cause dismissal of the complaint of the party so refusing.

— *Rohauer v. Eastin-Phelan Corp.,* 499 F.2d 120 (8th Cir. 1974) is a case which involved admitted and repeated failures to comply with valid court orders coupled with unexcused failure to appear to show cause concerning the reason for the admitted non-compliance, the court stated:

> "In the context of this case, the now posited constitutional claims of plaintiff of lack of 5th Amendment due process and 7th Amendment right of trial by jury are frivolous." *Id.* at p. 22.

Petitioners agree with the observation of the *Rohauer* court and have previously advised the District Court of their agreement with this principle.

In arguing for the propriety of the trial contemplated by the January 9, 1979 order of the District Court, respondents rely entirely on the provisions of Rule 37(b) of the Federal Rules of Civil Procedure, as those provisions gather force and meaning from the common law, Section 15 of the Judiciary Act of 1789, 1 Stat. 82 (1789) and other sources.

Petitioners are entirely in agreement with the proposition advanced by respondents, *viz.*: that the District Court purports to be engaged in the exercise of equity powers conferred upon it by Rule 37(b) and its antecedents.

The problem, and thus the issue presented here, arises from the uncontested fact that the District Court threatens to employ its equity power to decide central issues raised by the Sea-Land counterclaims[14]—actions at law for treble damages—concerning which petitioners have properly demanded jury trial.[15]

B. The Actions at Law

Respondents do not dispute that the Sea-Land counterclaims are actions at law. They do not dispute the fact of

[14]The Sea-Land counterclaims purport to allege violations of Sections 1 and 2 of the Sherman Act [15 U.S.C. §§ 1, 2] and other federal statutes and seek treble damages pursuant to Section 4 of the Clayton Act, [15 U.S.C. § 15], Pet., App. D, pp. 7, 8; App. J, pp. 6, 7.

[15]It must be noted and stressed that both States and PFEL have specifically alleged, and Sea-Land has denied, that the Sea-Land counterclaims were brought in bad faith in furtherance of the violations alleged in the complaints filed by States and PFEL (Petition, App. F, ¶¶ 12, 13; App. H, ¶¶ 12, 13; App. K, ¶¶ 12, 13.) Thus, in trying the allegations of rebating raised by the Sea-Land counterclaims, the District Court will be required to try and determine the issue of bad faith raised by petitioners with respect thereto concerning which jury trial has also been demanded (Petition, App. F, p. 6; App. H, p. 6; App. K, p. 5).

proper jury demand, nor do they dispute that the District Court is going to conduct a non-jury trial[16] and make findings on the issue of rebating raised in the counterclaims. Respondents simply assert that since they have included the rebating issue in a motion filed by them and phrased in terms of F.R.Civ.P. Rule 37(b), the District Court's equity power provided by that rule extends to the counterclaim issues and that the District Court is therefore free to ignore petitioners' Rule 38 jury demands.[17] Petitioners suggest that this is an erroneous view of the law.

C. The Teaching of Beacon Theatres

In *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959) the petitioner sought a writ of mandamus to require a District Court judge to vacate an order striking a jury demand and separating, for non-jury trial, issues joined by a complaint and answer from those joined by a counterclaim and cross-complaint, *Beacon Theatres v. Westover,* 252 F.2d 864, 868 (9th Cir. 1958). The Ninth Circuit refused the writ. This Court granted certiorari because:

> "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our

[16]On June 1, 1979, respondents themselves characterized the proceedings contemplated by the January 9, 1979 order of the District Court:

> "We have spent extreme efforts in preparing for it carefully so it would be an expedited trial. . . . we feel we should take the full testimony at the trial, having given up the opportunity to have pretrial depositions in order to avoid this procedural problem." Hearing, June 1, 1979, TR. p. 8.

[17]In the footnote at page 19 of their Brief in Opposition, respondents admit that the issues involved in the minitrial are those raised by the pleadings, a fact established by the explicit language of the January 9, 1979 order and not altered by reference to the "speaking date" of the denials interposed to the allegations of rebating contained in the Sea-Land counterclaim.

history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care" Id. at 501.

This instant petition, like that in *Beacon, supra,* involves a situation in which a District Court has, in the apparent exercise of its equity powers set out to try issues raised in an action at law. In *Beacon, supra,* the central issue to be tried by the Court in equity was the reasonableness of "clearances", an issue common to the allegations of the complaint, counterclaim and cross-complaint. In our case, the central issue to be tried by the Court, sitting in equity without a jury, is the "payment of rebates" and the "false denials of rebating", an issue common and central to the allegations of the Sea-Land counterclaims and respondents' Rule 37(b) motion.

Respondents' recital that their pending Rule 37(b) motion for dismissal and sanctions is analogous to a "separate bill in equity for discovery in aid of the action at law[18] is, as far as it goes, helpful in illuminating the issue presented by petitioners. As noted, petitioners agree that the order of January 9, 1979 must be viewed as an attempt by the District Court to exercise what it conceives as its equitable jurisdiction. The issue, not addressed by respondents, is whether the District Court is overstepping the bounds of its equity jurisdiction in ordering a non-jury trial of the issue of rebating in the face of petitioners' proper demand for jury trial.[19] This Court's statement in *Beacon Theatres*

[18]Opp. Brief, p. 16.

[19]Petition, Appendix A, p. 5, ¶ 4:

"4. Plaintiffs have asserted that the *factual issues* raised by plaintiffs' denial of the contentions advanced by defendants in support of their Motion for Dismissal of Plaintiffs' Complaints and for Further Sanctions *are matters to be decided by the jury in a jury trial and not by the Court in an evidentiary hearing.*" (Emphasis added)

was that the right to a jury trial could not be lost by the blending of an action at law with one for equitable relief in aid of the legal action. Specifically, this Court stated:

> "Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. As this Court said in *Scott v. Neely* (citations omitted): 'In the Federal courts this [jury] trial right cannot be dispensed with, except by the assent of the parties entitled to it; *nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency.*'" Id. at 510 (emphasis added)

Contrary to respondents' assertion, the *Beacon* rule does not in any way impinge upon the full exercise of a District Court's power to impose sanctions upon a proper showing of willful misconduct.[20] It does, quite rightfully, act to

[20]Petitioners strenuously reject the contention that they have been guilty of any misconduct, willful or otherwise. They do not address this matter and the evidence pertinent thereto because it is strictly irrelevant to the issue before this Court. This Court should be advised that, because of the serious procedural and other abuses perpetrated by respondents, the progress of these lawsuits in the District Court has been completely stalled for almost two full years. In view of the actual record in the District Court, it does not lie in the mouth of these respondents to speak of, let alone advance an argument based upon, "this era of crowded dockets" which "deprive[s] other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism." (Opp. Brief, p. 12)

restrain a District Court from itself trying contested issues of material fact raised in an action at law concerning which jury trial has been properly demanded and not waived and does so, petitioners submit, irrespective of whether a District Court purports to act pursuant to Rule 37(b) or any other provision of the Federal Rules of Civil Procedure.

It is clear that a determination of the issue of the payment of rebates and the false denial of rebating by the District Court judge might operate either by way of res judicata or collateral estoppel so as to conclude the parties with respect thereto at any subsequent trial of the treble damage claim advanced in the Sea-Land counterclaims.

Petitioners submit that their entitlement to jury trial of the allegations of rebating and false denial of rebating set forth in the Sea-Land counterclaims—actions at law for treble damages—cannot be denied merely because respondents have included these matters as issues in a motion couched in terms of F.R.Civ.P. Rule 37(b).

Petitioners submit that the January 9, 1979 order of the District Court and the trial thereby contemplated violates the rule announced by this Court in *Beacon Theatres, supra,* and deprives petitioners of their properly demanded right to jury trial. The writ prayed for herein should be granted not only to restore to petitioners their right to jury trial but to avoid a procedure which is extremely expensive, oppressive, and unnecessary, *viz.* not only are petitioners faced with a deprivation of their right to jury trial, they are faced with a most onerous requirement that they participate in a multiplicity of trials on the same issues.

CONCLUSION

For the reasons stated, petitioners submit that the writ prayed for herein should be granted and the order of the Court of Appeals for the Ninth Circuit reversed.

Dated, June 7, 1979
San Francisco, California

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(Appendices Follow)

Appendices

Appendix 1

In the United States District Court
Northern District of California

Before: The Honorable Alfonso J. Zirpoli, Senior Judge

Pacific Far East Line, Inc., Plaintiff, vs. R. J. Reynolds Industries, Inc., R. J. Reynolds Tobacco Company, R. J. Reynolds Leasing Company, Sea-Land Service, Inc., and Mc Lean Industries, Inc., Defendants.	NO. C 76-2312 AJZ
States Steamship Company, Plaintiff, vs. Sea-Land Service, Inc., and R. J. Reynolds Tobacco Company, Defendants.	NO. C 77-0582 AJZ

REPORTERS' TRANSCRIPT

Tuesday, January 2, 1979

Reported by: Shirley S. Linkerman
Paul Schiller

[28] Mr. Alioto: And then there is another matter that I would like to also bring to the attention of the Court, which I consider to be—

The Court: What is the other matter?

Mr. Alioto: The other matter is, your Honor, that from the Court's recent order, it is clear to me, or at least my understanding, that this mini-trial that is going to go forward on the motions to dismiss—

The Court: Yes?

Mr. Alioto: At least insofar as they relate to the motion by the defendants, is to resolve the very question that was raised by the pleadings.

Sea-Land, when they filed their counterclaim, your Honor, they alleged—

The Court: Pleadings have nothing to do with alleged fraud or obstruction.

The pleadings presume no fraud, they presume no obstruction.

Mr. Alioto: No, they did. As a matter of fact the allegation made, if I can read it to your Honor, the [29] allegation made in the counterclaim by Sea-Land, at page 5 of their answer and counterclaim, paragraph 26, was that "the acts of States" and this is the same language for P.F.E.L., "The acts of States in failing to disclose or in issuing false denials of the existence of rebates and other payments and practices alleged in certain paragraphs constitute violations of Sections One and Two of the Sherman Act," et cetera.

So that they claim that States and P.F.E.L. have failed to disclose or issued false denials of the existence of the rebates.

In response to that, we demanded a trial by jury in our complaint, of course, and when we responded to that allegation and also had our own counterclaim to that, we also made a demand for a jury trial on our defense on the issues raised by Sea-Land.

The Court: Are you talking about States alone now?

Mr. Alioto: Both States and P.F.E.L. . . .

[30] Mr. Alioto: Your Honor, the Court first of all is, in fact, as I understand it, going to conduct a mini-trial. The point is that all of the witnesses deny that P.F.E.L or States paid rebates during the relevant time period.

[31] In order to say otherwise, the Court would have to decide the credibility of these witnesses on the very issue which is framed by the pleadings for which the parties have demanded jury trial.

So that if the Court decides the credibility of the witnesses, this is not, Your Honor—

The Court: If there is no question that a fraud has been perpetrated on the Court, the Court is under no obligation to go through a jury trial.

Mr. Alioto: Your Honor, in the cases which I think the Court is talking about, you have confessions by the parties, either by the Government or by someone else, that they gave false testimony, or they gave false evidence. These are contentions, and the question then becomes sanctions.

But I don't believe, Your Honor, that there is any case in which the credibility of the witness, where it is contested, where the witness or witness' credibility is in issue, that the Court ventures on the kind of thing that the Court is talking about.

The Court: Mr. Alioto, I am satisfied that I have before me a proper motion to consider on the question of sanctions.

What my ruling will be I don't know, and I won't know until I have gone into it in the detail that I expect [32] you gentlemen to go into it at the time of presentation, so I don't know. . . .

[36] Mr. Alioto: Yes, but their motion, Your Honor, is that—their motion to dismiss is that P.F.E.L. and States were rebating during the relevant time period, but concealed and denied that. And we denied it in the pleadings for which we demanded a trial by jury.

For the Court to entertain a mini-trial to determine that issue, the Court must, in effect, try the case that is framed by the pleading.

And to decide in their favor, the Court must [37] determine the credibility of the witnesses and the evidence, the so-called prima facie evidence of their counterclaim. . . .

Mr. Alioto: All right. Here is the point I would like to raise with Your Honor. And I would like time to do it.

The Court: You're saying to me that if their issue is a fact involving credibility of witnesses, I have no right to dismiss the case, that's what you're saying, in substance and effect.

Mr. Alioto: That's only part.

Your Honor, the motion—the Motion to Dismiss is based upon an allegation that P.F.E.L. and States failed to disclose, or falsely represented that they did not engage in rebating during the relevant time period.

The Court: When they in fact knew that they had so engaged?

Mr. Alioto: Correct.

The Court: That's the point.

[38] Mr. Alioto: Correct.

And that is the issue——

The Court: Well, all right.

Mr. Alioto:—that they have raised in the counterclaim, which both P.F.E.L. and States has denied, have denied, and for which——

The Court: Well, they didn't know you were going to necessarily deny it. You might have admitted it.

Mr. Alioto: We denied it.

The Court: I know. Let's assume you admitted it.

Mr. Alioto: We didn't admit. We denied it.

That's the basis of their complaint.

The Court: You deny it, and they say this denial is false, and it's a deliberate denial, and a fraud upon the Court. . . .

Mr. Alioto:Your Honor, Your Honor, every complaint that has—every answer that is filed by a defendant, where the defendant denies the charge made, it goes to a trial.

Plaintiffs have won cases. The fact that they [39] won—

The Court: Yes, but you aren't permitted—you aren't permitted—as an officer of a court, you should never deny that which you believe to be true.

Mr. Alioto: Correct. But if you believe the denial is correct——

The Court: Well——

Mr. Alioto: ——and all of the witnesses—

The Court: They are going to show the circumstances —they hope to show, I should say—they hope to show that the circumstances are such that there was no basis in fact or in law for your denial.

And if there was no basis in fact or in law for your denial, then a fraud is presumably being practiced upon the Court.

On the other hand, by way of illustration, counsel could have—well, I'm not going to go into what you could have done. Okay.

Mr. Alioto: Your Honor, the fact of the matter is that all of the witnesses for both P.F.E.L. and for States have denied the charge.

The Court: Well, all right.

Mr. Alioto: All right. This is what I would request, Your Honor.

The Court: All right.

[40] Mr. Alioto: I would request permission—

The Court: Yes.

Mr. Alioto: I would request permission for some time to—I believe that this is a very substantial question on the denial of the demand for jury trial by both States and P.F.E.L.

I would request that the court permit me to file a Writ of Mandamus no later than—today is Tuesday—no later than Thursday.

The Court: Well, you can always file it any time before the hearing. Nobody is going to stop you.

Mr. Alioto: Okay. The hearing—it would be a request to—it would be a request to the Court of Appeals to stop the hearing, which, in effect, amounts to a mini-trial of the very issue charged by Sea-Land in its counterclaim denied by both of the plaintiffs.

The Court: Mr. Alioto—

Mr. Alioto: If this goes forward on the 8th.

The Court: Let me tell you something.

Mr. Alioto: Yes.

The Court: You want to do that?

Mr. Alioto: I would like to.

The Court: I think I should give you the privilege of doing it, very frankly.

Mr. Alioto: I wouldn't try to be—I'm not [41] trying to delay anything, Your Honor.

The Court: Oh, no, no, I'm not saying that you're trying to delay anything, but what you're doing is, if the Court of Appeals rules in my favor——

Mr. Alioto: Yes.

The Court: ——you are not strengthening your hand.

Mr. Alioto: Correct, Your Honor.

The Court: All right.

Mr. Alioto: If the Court of Appeals—Your Honor, if the Court of Appeals does not rule in my favor, if they don't take the mandamus, that means they don't want to be bothered by it.

[42] The Court: I don't know what they will say. They may write an opinion in which they say if these facts are established, certain facts are established, this is clearly a case where the Court is warranted in dismissing and should dismiss.

If you are prepared to run the risk of that kind of an opinion out of the Court of Appeals, I'm going to grant you that privilege.

Mr. Alioto: All right, Your Honor. I think I must.

The Court: What I am going to do—

Mr. Alioto: I think I must.

The Court: When do you want to file your Petition for a Writ of Mandamus?

Mr. Alioto: I want to file it on Thursday.

The Court: Very good.

Mr. Alioto: Before I do, Your Honor, I would like to do this. As I see it, I don't want to be filing a Writ of Mandamus that is—that is different than what the Court believes is going on, or does not meet the issues straightaway.

I understand that the motion to dismiss filed by Sea-Land is that we, the plaintiffs, P.F.E.L. and States, have falsely denied, or failed to disclose the language in the pleadings —I'm not sure about, but if I could get [43] it, it's—. . . .

Mr. Alioto: All right. But, now, Your Honor, *I would not* file the mandamus if that were the issue, because if there were confession of perjury or something, if there were anything other than they have framed it in their counterclaim, they have said that we have falsely denied it, they have said that we have—that we have—the language for both is the same. This is their counterclaim, it's the very first paragraph of their counterclaim.

They say that "The acts of States"—and the same language for P.F.E.L.—"The acts of States in failing to disclose or in issuing false denials of the existence [44] of rebates, and other payments alleged in paragraphs 23 and 25 above constitute violations of Section 1 and 2 of the Sherman Act."

In other words, the basis of their claim is that both States and P.F.E.L. failed to disclose, and issued false denials.

Our answer to this was that we deny this charge. And we have demanded a trial by jury for this charge. Now, this is also the basis for the motion to dismiss.

We have denied the basis—

The Court: It's one of the bases for the motion to dismiss.

Mr. Alioto: Even if it were just one, it's the principal one. Even if it were one of twenty, at least that part could not go forward.

The Court: All right, all right. If you gentlemen want to —if you can frame the issue for me, I'll see what you frame.

If you can't, why, I'll frame it myself.

Mr. Alioto: All right. I would like to frame it, because I would not—in a way, I understand I'm imposing on the court, but I would not desire to attempt to take a mandamus against the Court if I—if I didn't—if perhaps I misconceived what the notion or basis was.

But I think it is serious enough that if I am [45] correct, I should proceed this way. And, obviously, I would have to take all the consequences that proceed from it. I don't know what they would be, but I think it is serious enough. . . .

Appendix 2

In the United States District Court
Northern District of California

Before: The Honorable Alfonso J. Zirpoli, Senior Judge

Pacific Far East Line, Inc., Plaintiff, vs. R. J. Reynolds Industries, Inc., R. J. Reynolds Tobacco Company, R. J. Reynolds Leasing Company, Sea-Land Service, Inc., and Mc Lean Industries, Inc., Defendants.	NO. C 76-2312 AJZ
States Steamship Company, Plaintiff, vs. Sea-Land Service, Inc., and R. J. Reynolds Tobacco Company, Defendants.	NO. C 77-0582 AJZ

REPORTER'S TRANSCRIPT

Wednesday, December 13, 1978

Reported by: Candace L. Mikkalsen
Wanda J. Harris

[22] 1976 they did not engage in rebating?

Mr. Alioto: The plaintiffs did not. The evidence is that—

The Court: I don't know about the evidence. Is the plaintiff's contention, now, are they saying now and counsel should know enough about his case, now—

Mr. Alioto: Yes.

The Court: Are you saying to this Court, now, that it is your position and, if necessary, that we can establish that prior to October 15, 1976 you did not engage in rebating?

Mr. Alioto: That's correct. PFEL did—

The Court: Pardon?

Mr. Alioto: That's correct. PFEL did not.

The Court: PFEL did not?

Mr. Alioto: An agent did.

The Court: Well, then, if PFEL did not, then what would be wrong with a further inquiry with relation to these three witnesses, as to any conversation that took place relating to rebating of PFEL prior to October 15, 1976?

Mr. Alioto: Pardon me. I don't understand that.

The Court: It's your contention that you didn't.

Mr. Alioto: Correct.

The Court: And what reason would there be for them to discuss rebating prior to October 15, 1976 at the . . .
[68] almost simultaneously. The other witness said within two weeks. The other witness said he couldn't remember how soon after.

[68] Does Your Honor know what happened?

The Court: Well, what happened?

Mr. Alioto: That's what I mean, Your Honor. The fact is that after the meeting, one thing that happened was that rebating by PFEL in 1977 stopped. Almost simultaneously, or two weeks after.

Did Your Honor hear that from counsel? He said there's no—he said there was—

The Court: That's quite plain from the record.

Mr. Alioto: Okay.

The Court: You don't have to tell me that. I knew that.

Mr. Alioto: All right, Your Honor.

The Court: There's some testimony—John I. Alioto testified to that.

Mr. Alioto: Well, as a matter of fact, it was Mr. Hitt, Your Honor, and Mr. Alioto.

The Court: Yes.

Mr. Alioto: All right. Now, what I would like to do, Your Honor, is to first of all—first of all, I think I have to do it. I was not prepared to do it because I thought that counsel, I guess, really was arguing the motion for sanctions on both sides, or at least arguing his side.

Appendix 3

United States District Court
for the Northern District of California

Pacific Far East Line, Inc., Plaintiff, vs. R. J. Reynolds Industries, Inc., et al., Defendants.	NO. C 76-2312 AJZ
States Steamship Company, Plaintiff, vs. Sea-Land Service, Inc. and R. J. Reynolds Tobacco Company, Defendants.	NO. C 77-0582 AJZ

[Filed June 2, 1978]

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT AND ESTABLISHING NEW DISCOVERY SCHEDULE

Defendants have moved for an order striking plaintiffs' rebating allegations, either as a sanction under Fed.R. Civ.P. 37(d) for failure to make discovery or as a grant of partial summary judgment under Fed.R.Civ.P. 56 on the ground that such allegations fail to state a claim under the antitrust laws. Plaintiffs have filed a counter motion for

orders directing defendants to produce an unedited copy of the Audit Report and permitting all parties in this action to commence discovery on all issues. With respect to the Audit Report, the court will once again review that document to determine what additional portions thereof, if any, not heretofore disclosed, shall be subject to discovery. With respect to defendants' motions and plaintiffs' request regarding the future course of discovery in this action, the court has considered the briefs submitted and the argument of counsel and rules as follows:

1. Defendants' motion for summary judgment, insofar as it is directed at plaintiffs' rebating claims under Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), is granted. That Act does not apply to the rendition of services, and the phrase "goods, wares, or merchandise" contained therein refers solely to tangible items. *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851, 861 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

2. Defendants' motion for summary judgment, insofar as it is directed at plaintiffs' rebating claims under the Sherman Act, is denied. Plaintiffs are entitled to attempt to show (1) that such practices constitute an unreasonable restraint of trade in the shipping industry and (2) that, in conjunction with plaintiffs' other allegations, they may constitute a predatory practice in connection with an attempt to monopolize.

3. Defendants' motion for sanctions is denied.

4. The date of March 1, 1978, in paragraph 9 of the court's order dated December 20, 1977, is hereby changed to June 2, 1978.

5. The date of April 30, 1978, in paragraph 10 of the court's order dated December 20, 1977, is hereby changed to July 14, 1978.

Dated: June 2, 1978

Alfonso J. Zirpoli
United States District Judge